



1 II.

2 **BACKGROUND**

3 Plaintiff was born on May 25, 1959. [Administrative Record (“AR”) at 38, 125.] He has a  
4 high school education from Mexico [AR at 39, 137], and past relevant work experience as a  
5 construction site machine operator, a cook, and an agricultural worker. [AR at 77-79, 141, 194.]

6 On May 18, 2004, plaintiff filed his applications for Disability Insurance Benefits and  
7 Supplemental Security Income payments, alleging he has been unable to work since August 3,  
8 2001, due to, among other things, back and shoulder problems. [AR at 125-27, 130-46.] After his  
9 applications were denied initially and on reconsideration, plaintiff requested a hearing before an  
10 Administrative Law Judge (“ALJ”). [AR at 89-103, 107.] A hearing was held on April 27, 2006, at  
11 which plaintiff appeared with counsel and testified, through an interpreter, on his own behalf. A  
12 medical expert also testified. [AR at 33-59.] A supplemental hearing was held on October 13,  
13 2006, at which plaintiff appeared with counsel and testified again, through an interpreter, on his  
14 own behalf. A vocational expert and a medical expert also testified. [AR at 60-85.] On December  
15 7, 2006, the ALJ determined that plaintiff was not disabled. [AR at 17-28.] When the Appeals  
16 Council denied plaintiff’s request for review on August 18, 2008, the ALJ’s decision became the  
17 final decision of the Commissioner. [AR at 6-9, 16.] This action followed.

18  
19 III.

20 **STANDARD OF REVIEW**

21 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s  
22 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial  
23 evidence or if it is based upon the application of improper legal standards. Moncada v. Chater,  
24 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

25 In this context, the term “substantial evidence” means “more than a mere scintilla but less  
26 than a preponderance -- it is such relevant evidence that a reasonable mind might accept as  
27 adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at  
28 1257. When determining whether substantial evidence exists to support the Commissioner’s

1 decision, the Court examines the administrative record as a whole, considering adverse as well  
 2 as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th  
 3 Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court  
 4 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,  
 5 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

#### 7 IV.

#### 8 THE EVALUATION OF DISABILITY

9 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
 10 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
 11 expected to result in death or which has lasted or is expected to last for a continuous period of at  
 12 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

#### 14 A. THE FIVE-STEP EVALUATION PROCESS

15 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
 16 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,  
 17 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must  
 18 determine whether the claimant is currently engaged in substantial gainful activity; if so, the  
 19 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in  
 20 substantial gainful activity, the second step requires the Commissioner to determine whether the  
 21 claimant has a “severe” impairment or combination of impairments significantly limiting his ability  
 22 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.  
 23 If the claimant has a “severe” impairment or combination of impairments, the third step requires  
 24 the Commissioner to determine whether the impairment or combination of impairments meets or  
 25 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R., Part 404,  
 26 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.  
 27 If the claimant’s impairment or combination of impairments does not meet or equal an impairment  
 28 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has

sufficient “residual functional capacity” to perform his past work; if so, the claimant is not disabled and the claim is denied. Id. The claimant has the burden of proving that he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie case of disability is established. The Commissioner then bears the burden of establishing that the claimant is not disabled, because he can perform other substantial gainful work available in the national economy. The determination of this issue comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

## **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

In this case, at step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since August 3, 2001, the alleged onset date of the disability.<sup>1</sup> [AR at 22.] At step two, the ALJ concluded that plaintiff “has the following severe impairments: shoulder tendonitis, disorder of the lumbar spine, disorder of the cervical spine, and depression.” Id. At step three, the ALJ determined that plaintiff’s impairments do not meet or equal any of the impairments in the Listing. [AR at 23.] The ALJ further found that plaintiff retained the residual functional capacity (“RFC”)<sup>2</sup> “to perform a range of light work as follows:”

able to lift and/or carry up to 20 pounds occasionally and up to ten pounds frequently; has limitations in his ability to push and pull consistent [with] the limitations for lifting and carrying; is able to stand and/or walk for six hours and sit for eight hours during an eight-hour workday; must have a sit/stand option in which he is allowed to change position for one to three minutes each hour; can occasionally climb stairs, balance, bend or stoop, crouch, kneel, crawl, and reach above his shoulder or head with either upper extremity; cannot hold his head in a fixed position for more than one hour without changing position for one to three minutes; can frequently move his neck to 50 percent of his range of motion and can occasionally move his neck to extreme range of motion; can occasionally operate foot controls with his left lower extremity; can do simple, repetitive tasks; cannot have intense interpersonal contact with co-workers, supervisors, or the general public; cannot perform high production, high quota, or rapid assembly line work;

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<sup>1</sup> The ALJ also determined that plaintiff was insured for Disability Insurance Benefits purposes through December 31, 2005. [AR at 22.]

<sup>2</sup> RFC is what a claimant can still do despite existing exertional and nonexertional limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

cannot perform work involving close deadlines; and cannot perform work involving greater than ordinary stress.

[AR at 23-27.] At step four, the ALJ concluded that plaintiff was unable to perform his past relevant work. [AR at 27.] At step five, the ALJ concluded that there are jobs existing in significant numbers in the national economy that plaintiff can perform. [AR at 27-28.] Accordingly, the ALJ determined that plaintiff is not disabled. [AR at 28.]

## V.

### THE ALJ'S DECISION

Plaintiff contends that the ALJ failed to properly evaluate his mental impairments, and that the Commissioner failed to provide clear and convincing reasons for disregarding the findings of Dr. Tushar Doshi, plaintiff's treating physician. [Joint Stipulation "JS" at 4-8, 10-14, 16-17.] As set forth below, the Court agrees with plaintiff, in part, and remands the matter for further proceedings.

#### **A. THE ALJ'S CONSIDERATION OF PLAINTIFF'S MENTAL IMPAIRMENTS**

Plaintiff argues that the ALJ failed to properly consider the findings of Dr. Ana L. Nogales, plaintiff's treating psychologist, in considering the extent and disabling impact of plaintiff's mental impairments. [JS at 4-8, 10-11.] The medical evidence indicates that after sustaining a work-related injury in July 2000, plaintiff experienced various physical and psychological symptoms including, among others, back pain and stiffness; shoulder and neck pain; insomnia; muscle aches; difficulty standing, bending, and sitting for prolonged periods of time; anxiety; and depression. [See, e.g., AR at 197, 199, 249, 250, 264, 313-15, 319-24, 333-38, 376-81, 493-94, 508.]

On October 8, 2002, and April 29, 2003, Dr. Nogales prepared reports concerning plaintiff's mental impairments and limitations. [AR at 344-67, 371-97.] In the October 8, 2002, report, Dr. Nogales noted that plaintiff reported, among other symptoms, difficulty sleeping, a decrease in appetite, a loss of energy, difficulty concentrating and carrying out daily activities, anxiety, anger, and depression, all which plaintiff attributed to his work-related injuries. [AR at 376-81.] Dr.

1 Nogales diagnosed him with a mood disorder due to a general medical condition. [AR at 381.]  
2 With regard to work restrictions, she opined that plaintiff must not work under his previous  
3 manager and “must avoid more than the ordinary amounts of emotional stress.” [AR at 384.]

4 On April 29, 2003, Dr. Nogales completed a second report in which she revised her findings  
5 concerning plaintiff’s mental impairments and limitations. [AR at 344-67.] She noted that plaintiff  
6 reported essentially the same symptoms that he described in October 2002, and that he also  
7 reported experiencing panic attacks during which he has heart palpitations and difficulty breathing.  
8 [AR at 346-49.] Dr. Nogales again diagnosed plaintiff with mood disorder due to a general medical  
9 condition and asserted that he should not work for his previous manager or in an environment with  
10 more than an ordinary amount of emotional stress. [AR at 350-52.] In addition, she opined that  
11 plaintiff should not work under close deadlines or with “contentious, unreasonable, or otherwise  
12 exasperating members of the public.” [AR at 352.] She also opined that plaintiff has slight or  
13 slight to moderate<sup>3</sup> impairments in his ability to: 1) comprehend and follow instructions (including  
14 maintaining attention and concentration, applying common sense, carrying out instructions, and  
15 adapting to situations); 2) perform simple and repetitive tasks (including asking questions and  
16 requesting assistance, performing routine activities, and remembering locations and procedures);  
17 3) maintain an appropriate work pace (including performing activities on schedule, maintaining  
18 regular and punctual attendance, and not taking excessive breaks); 4) perform complex or varied  
19 tasks (including synthesizing and analyzing data, and performing jobs with precise standards, and  
20 performing a variety of duties without losing efficiency); 5) relate to other people beyond giving and  
21 receiving instructions (including getting along with peers, performing activities requiring speaking  
22 with others, responding appropriately to supervisors’ criticism); 6) influence other people (including  
23 convincing and directing others, understanding and using words effectively, and interacting  
24 appropriately); 7) make decisions, generalizations or evaluations without supervision (including  
25 recognizing potential hazards and precautions, remembering and understanding detailed

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28 <sup>3</sup> Dr. Nogales defined a “slight” impairment as one that “limits [but] does not preclude the  
function,” and a “moderate” impairment as one that “markedly limits the function.” [AR at 356.]

1 instructions, and making independent decisions); and 8) accept and carry out responsibility for  
 2 direction, control and planning (including independently setting realistic goals and instructing or  
 3 supervising others). [AR at 356-60.]

4 In evaluating medical opinions, the case law and regulations distinguish among the opinions  
 5 of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who  
 6 examine but do not treat the claimant (examining physicians); and (3) those who neither examine  
 7 nor treat the claimant (non-examining physicians). See 20 C.F.R. §§ 404.1502, 416.927; see also  
 8 Lester, 81 F.3d at 830. Generally, the opinions of treating physicians are given greater weight  
 9 than those of other physicians, because treating physicians are employed to cure and therefore  
 10 have a greater opportunity to know and observe the claimant. Orn v. Astrue, 495 F.3d 625, 631  
 11 (9th Cir. 2007); Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). The ALJ is required to  
 12 provide an explicit explanation, supported by evidence in the record, of the weight given to treating  
 13 physicians' medical opinions. 20 C.F.R. §§ 404.1527(d), 416.927(d); Social Security Ruling 96-2p<sup>4</sup>  
 14 ("the notice of the determination or decision must contain specific reasons for the weight given to  
 15 the treating source's medical opinion, supported by the evidence in the case record, and must be  
 16 sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to  
 17 the treating source's medical opinion and the reasons for that weight.").

18 In the decision, the ALJ only explicitly addressed Dr. Nogales' findings from her October  
 19 2002 report. [AR at 25.] Specifically, the ALJ noted that Dr. Nogales opined that plaintiff "should  
 20 not work under the supervision of his previous manager . . . but could perform work that did not  
 21 involve 'more than the ordinary amounts of emotional stress.'" [AR at 25; quoting AR at 384.]  
 22 However, the ALJ failed to even mention, let alone explain the weight that he afforded, Dr.  
 23 Nogales' April 2003 report. To the extent the ALJ rejected Dr. Nogales' April 2003 findings  
 24 concerning plaintiff's limitations, and instead credited the findings of another physician, the ALJ

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 26 <sup>4</sup> Social Security Rulings ("SSR") do not have the force of law. Nevertheless, they "constitute  
 27 Social Security Administration interpretations of the statute it administers and of its own  
 28 regulations," and are given deference "unless they are plainly erroneous or inconsistent with the  
 Act or regulations." Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989).



1 was required to provide specific and legitimate reasons for doing so based on substantial evidence  
2 in the record. Lester, 81 F.3d at 830; see Ramirez v. Shalala, 8 F.3d 1449, 1453-54 (9th Cir.  
3 1993). To the extent that the ALJ implicitly adopted some but not all of Dr. Nogales' April 2003  
4 opinion regarding plaintiff's limitations, that too was erroneous. Specifically, the ALJ's RFC  
5 determination appears to include Dr. Nogales' April 2003 conclusions that plaintiff cannot work  
6 with exasperating members of the public, under close deadlines, or in an environment with more  
7 than ordinary stress, and that his ability to perform complex or varied tasks is impaired. [See AR  
8 at 23.] However, there is no indication that the ALJ took into account the remaining specific  
9 limitations set forth in Dr. Nogales' April 2003 assessment, and he provided no explanation why  
10 certain limitations were adopted while others were not. [See AR at 356.] By ignoring some of the  
11 limitations set forth in Dr. Nogales' April 2003 assessment, the ALJ effectively rejected a portion  
12 of her medical opinion. It follows, therefore, that the ALJ did not provide sufficient reasons for the  
13 rejection. See SSR 96-2p; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981) ("Since  
14 it is apparent that the ALJ cannot reject evidence for no reason or the wrong reason, an  
15 explanation from the ALJ of the reason why probative evidence has been rejected is required so  
16 that a reviewing court can determine whether the reasons for rejection were improper.") (internal  
17 citation omitted). As such, remand is warranted so that the ALJ can explicitly weigh and properly  
18 credit or reject Dr. Nogales' April 2003 findings.

## 19 20 **B. DR. DOSHI'S MEDICAL OPINION**

21 Plaintiff asserts that the Commissioner abused his discretion in not remanding plaintiff's  
22 case after he submitted additional medical evidence to the Appeals Council (reflecting Dr. Doshi's  
23 opinion regarding plaintiff's functional limitations) after the ALJ's unfavorable decision but before  
24 the Council denied plaintiff's request for review. [JS at 11-14, 16-17.]

25 Dr. Doshi apparently treated plaintiff's orthopedic injuries since March 2005. [AR at 525-47,  
26 616-20.] His treatment records indicate that he diagnosed plaintiff with "lumbosacral sprain/strain  
27 with left lower radiation" and repeatedly found him to be "temporarily totally disabled." [AR at 526,  
28 529, 532, 535, 537, 541, 545.] On April 5, 2007, Dr. Doshi completed a Physical Residual



1 Functional Capacity Questionnaire, in which he assessed plaintiff's functional limitations resulting  
2 from his orthopedic conditions. [AR at 616-20.] Dr. Doshi opined that due to plaintiff's "physical  
3 [and] mechanical symptoms he is unable to work." [AR at 617.] He also concluded that plaintiff  
4 can walk less than one city block without rest, lift up to ten pounds occasionally, sit for 45 minutes  
5 continuously and stand for 30 minutes continuously at one time, sit for less than two hours total  
6 in an eight-hour workday, and stand and/or walk for less than two hours in an eight-hour workday.  
7 [AR at 617-19.] Dr. Doshi opined that if he were to work, plaintiff would need a job that would  
8 permit him to shift positions at will from sitting, standing or walking; that he would need to take  
9 unscheduled breaks to walk around and shift positions for approximately five minutes every 15  
10 minutes; and that he would likely miss work more than three times each month due to his  
11 impairments or medical treatment. [AR at 618-20.]

12 As remand is warranted so that the ALJ can reconsider Dr. Nogales' medical assessments,  
13 the Court will exercise its discretion not to address whether the Commissioner abused his discretion,  
14 as plaintiff asserts, in failing to remand in light of the additional medical records that plaintiff submitted  
15 to the Appeals Council after the ALJ's decision. [See JS at 12; AR at 614-20.] Rather, all of the  
16 medical evidence (including any medical evidence not previously considered by the ALJ) must be  
17 re-examined in light of the Court's remand Order.

## 18 VI.


### 19 REMAND FOR FURTHER PROCEEDINGS

20 As a general rule, remand is warranted where additional administrative proceedings could  
21 remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th  
22 Cir. 2000), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir.  
23 1984). In this case, remand is appropriate in order to properly consider Dr. Nogales' findings  
24 concerning plaintiff's mental limitations, and to consider the updated medical evidence. The ALJ  
25 is instructed to take whatever further action is deemed appropriate and consistent with this  
26 decision.  
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1 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**;  
2 (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant  
3 for further proceedings consistent with this Memorandum Opinion.

4 **This Memorandum Opinion and Order is not intended for publication, nor is it**  
5 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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8 DATED: January 7, 2010



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PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE